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Communication No. 1945/2010

Views adopted by the Committee at its 107th session (11 to 28 March 2013)

<i>Submitted by:</i>	María Cruz Achabal Puertas (represented by counsel, Mr. Jaime Elías Ortega)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	2 November 2009 (initial submission)
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<i>Subject matter:</i>	Torture in the course of incommunicado detention
<i>Procedural issues:</i>	Matter already being examined under another procedure of international investigation or settlement; exhaustion of domestic remedies
<i>Substantive issues:</i>	Right not to be subjected to torture or to cruel, inhuman or degrading punishment or treatment; right to an effective remedy
<i>Articles of the Covenant:</i>	7; 2, paragraph 3
<i>Articles of the Optional Protocol:</i>	5, paragraph 2 (a) and (b)

* Second reissue for technical reasons (19 July 2013).

Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (107th session)

concerning

Communication No. 1945/2010*

Submitted by: María Cruz Achabal Puertas (represented by counsel, Mr. Jaime Elías Ortega)

Alleged victim: The author

State party: Spain

Date of communication: 2 November 2009 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 March 2013,

Having concluded its consideration of communication No. 1945/2010 submitted to the Human Rights Committee on behalf of Ms. Maria Cruz Achabal Puertas under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all the written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Ms. Maria Cruz Achabal Puertas, a Spanish national born on 16 October 1961. She claims to be the victim of a violation by Spain of her rights under article 10, paragraph 1, of the Covenant. She is represented by counsel.¹

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

The texts of two individual opinions are appended to the Views. One has been signed by the Committee members Mr. Yuji Iwasawa, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Ms. Anja Seibert-Fohr, Mr. Yuval Shany and Mr. Konstantine Vardzelashvili. The other has been signed by Mr. Cornelis Flinterman and Mr. Fabián Omar Salvioli.

¹ The Optional Protocol entered into effect for Spain on 25 April 1985. At the time of ratification Spain made the following reservation: "The Spanish Government accedes to the Optional Protocol to the International Covenant on Civil and Political Rights, on the understanding that the provisions of article 5, paragraph 2, of that Protocol mean that the Human Rights Committee shall not consider any

The facts as presented by the author

2.1 At around 2.30 a.m. on 7 June 1996, a group of approximately 15 police officers went to the author's home in Bilbao and, following a thorough search, arrested her on suspicion of belonging to an armed group. She was driven to the La Salve police station where they took her fingerprints, photographed her and took away her possessions. The same night, she was driven to the Civil Guard Headquarters in Madrid. In the course of the journey, during which she was crouched and blindfolded, she was punched and subjected to threats including that of enforced disappearance. On arrival, they made her pass through a kind of tunnel in which they began to beat her about the head, making such comments as "You're not leaving here alive" and "You've reached the end". The author remained blindfolded until she arrived at a prison cell. Some minutes later they put a black hood on her head and she was taken to a room where, with shouting and shoves, several police officers put pressure on her to confess.

2.2 There were several interrogation sessions of this sort, in which she received blows to the head, was insulted and threatened with sexual abuse, interspersed with brief periods in a cell. On one occasion, she was subjected to an attempted rape, which caused her to lose consciousness. After a while and still wearing the hood, she was taken to a forensic medical examiner, having been threatened beforehand not to speak of the treatment that she had received. On her return to the cell, she was told that her husband had been arrested and that he had already made a statement. Back in the interrogation room, they told her that her daughter had been arrested and that she was on the same premises and was going to be questioned. Pressure was placed on the author, to the point where they made her believe that her daughter was in the cells and she even believed that she could hear her crying and could see black t-shirts and a pair of shorts similar to ones belonging to her daughter. They also told her that they were going to sexually abuse her daughter. She was taken to see the medical examiner a second time, whom she told she had suffered a panic attack and had experienced difficulty breathing. The pressure with regard to her daughter and the interrogation continued, with the result that the author answered the officers' questions in the way they wanted her to. She was given some pages to read and told that they would form her statement, incriminating the persons named in them. Later they told her that she was to make her statement before a court-appointed lawyer and that, if she did not read the statement as written or if she reported her ill-treatment, her daughter would pay the consequences. When they told her this, they half opened a door so that she could see the black shoes and trousers similar to those belonging to her daughter and she thought she could hear her daughter crying. This is how she made her first statement before a person they told her was a court-appointed lawyer, another person who took notes, another who asked her questions and one other person. The insults and threats continued after this session and the author was taken to see the forensic medical examiner again, whom she told she continued to suffer severe panic attacks.

2.3 Following further interrogations in the presence of another court-appointed lawyer and more threats, she was taken to the National High Court. There, she endorsed her statements and did not report the torture she had suffered. From there she was transferred to Carabanchel Detention Centre where she was held until February 1997. During her time in the Centre, the medical services noted that she suffered from panic attacks, nightmares and night terrors and was exhibiting signs of gradual deterioration. On 11 February 1997, she was transferred to Nanclares de la Oca Detention Centre. Medical reports from this prison state that she suffered from panic attacks, anxiety, tachycardia and difficulty sleeping and

communication from an individual unless it has ascertained that the same matter has not been or is not being examined under another procedure of international investigation or settlement."

on several occasions during these panic attacks she recalled what had happened in the police station.

2.4 Owing to her deteriorating health, in April 1997 she was admitted to Santiago Apóstol Hospital in Vitoria-Gasteiz, where she stayed for several weeks and was diagnosed with post-traumatic stress disorder and severe depression. A psychiatric report produced by the hospital, dated 2 May 1997, states that, *inter alia*, “she has suffered a number of panic attacks during her hospitalization ... which have ended in fainting episodes ... These episodes appear to have been triggered by stimuli that reminded her of her trauma, such as being led through a basement corridor to the radiology department, being asked to tell us about the events that triggered these episodes or receiving certain visits/news”. The report concludes: “even though we have only her testimony as evidence, given the consistency of her account and the objective assessment of her symptoms when she was admitted, we rule out the possibility that the disorder is simulated. She is suffering a series of continual stresses that remind her of her trauma, such as her time in prison and custody, which have led to the self-perpetuation of her symptoms ... The absence of a personality disorder or a previous psychiatric history is also noteworthy, although it is probable that the problems that the patient has suffered (economic and family problems and difficulties in her everyday life and her work ...) have acted as predisposing factors with regard to her current disorder.”

2.5 On 13 June 1997, the author was released on bail. In July 1997, she was examined at the Ercilla Mental Health Centre in Bilbao. On 4 November 1997, Dr A.C.A., the Director of the Centre, produced a report in which he wrote that the author had no previous personal psychiatric history but was suffering from chronic post-traumatic stress disorder owing to her detention in June 1996 by the Civil Guard. The report states that “the patient’s psychological suffering is consistent with the testimony described and with the logic of abuse, painting a sinister picture, both in the present as in the future, since her emotional balance and interpersonal relations have been affected (she virtually communicates only with her daughter). The patient is in despair and socially withdrawn, needs constant company and is incapable of attending to her own needs without help. This indicates a significant deterioration in the most important areas of a person’s life”. The report also states that “any statement given under the conditions described in the patient’s account must be considered tainted, owing to its origin”.

2.6 In November 1997, on the recommendation of Dr. A.C.A., the author was admitted to the Zaldibar Psychiatric Hospital, where the medical team confirmed the previous diagnosis. This was set out in a report sent by Dr. D.A.T., a psychiatrist at the hospital, to the National High Court in December 1997, in connection with the proceedings against the author. When asked by the Court what had triggered off the chronic post-traumatic stress disorder from which the author was suffering, the report responded that it was “being detained and living in fear for her physical safety”. In answer to the question whether there was any medical reason that might explain why the author had not made known to the legal authorities the ill-treatment that she claimed to have suffered, the report said that “the very pathology unleashed by the incident may be a sufficient reason to explain why she did not report the incident at the outset”.

2.7 In the ruling 27 January 1998, the author was acquitted by the National High Court of the crime of collaborating with an armed group, with which she had been charged. According to the ruling, the Court “does not consider the charge brought by the Public Prosecution Service to be justified on the basis of the police statement alone, taking into account the psychological state of the author at the time of making the statement, in the light of the evidence given by experts in the oral trial”. The judgement also showed that, prior to her detention, the author had lived a normal life and worked on a drug addiction project for Arrigorriaga local council. During her statement as an accused person, she reported the ill-treatment she had suffered at the police station, claiming that she had not

reported it before the court for fear of possible reprisals on the part of the same police officers.

2.8 The author stayed in hospital until March 1998, where she continued her psychiatric treatment and psychological therapy. She continues to receive treatment today, the disorder having become chronic. She claims that her state of health remains the same today, she is still unable to work and she suffers constant flashbacks.

2.9 On 18 October 2000, the author lodged a criminal complaint for the crimes of torture and assault against the Civil Guard officers who were allegedly responsible. In the course of the preliminary investigation, a number of pieces of evidence were submitted. The author considers the report produced by the forensic medical examiner of the Forensic Medical Clinic in Bilbao, Dr. G.P.L., submitted on 22 February 2002 by court order, to be of particular relevance. This report states that the author “suffers from post-traumatic stress disorder incidental to having undergone inhuman and degrading treatment, which included physical and psychological violence, during police detention in 1996. In spite of the passage of time, the disorder is still present and active in all its manifestations”. The report also states that the author “did not suffer from any psychiatric disorder or personality deviation prior to the detention by the police, which may be related to the disorder exhibited post-detention”. Furthermore, it states that “the post-traumatic stress disorder derives from her living through the psychologically traumatic situation described in her claim”. In his legal statement, Dr. G.P.L. fully stood by his report. Three other doctors who had treated the author made statements and the reports mentioned above were submitted to the court.

2.10 At the request of the prosecutor, a report was commissioned from a forensic doctor from Madrid, Dr. E.F.R. Without having examined the author, this doctor claimed that he could not confirm what event could have triggered the alleged post-traumatic stress disorder. In July 2002, the author requested that the doctor who had treated her in Zaldibar hospital should be required to make a statement. Although she was the only psychiatrist to have treated the author, she had not been called; and the same applied to the primary care physician and the psychologist who monitored her. However, this request was not granted.

2.11 On 26 August 2002, investigating judge No. 28 of Madrid issued an order to close the case. The order stated that there was no objective information to support the claim that the author had suffered ill-treatment during the hours in which she was detained at Civil Guard headquarters under the authority of the National High Court; that none of the three lawyers who had assisted her during her detention had observed any signs of physical ill-treatment, nor had she told them anything about it; and that there was not objective information confirming that such ill-treatment had occurred. It was therefore impossible to establish a causal link with the author’s illness.

2.12 The author lodged an application for reconsideration with subsidiary appeal against the order, maintaining that the psychiatric reports were consistent with her statement and were thus prima facie evidence with sufficient substance to continue with proceedings. She also stated that it should be the Provincial High Court that should conduct oral proceedings to determine whether there was sufficient evidence. The application for reconsideration was rejected on 11 October 2002. On 21 May 2003, the Madrid Provincial High Court dismissed her appeal and confirmed the decision. The Court considered that the author’s statement and the forensic medical reports did not prove that the ill-treatment that was the subject of her case had taken place. The author points out that the proceedings before the examining court did not require proof to be adduced that she had suffered ill-treatment, since the Criminal Procedure Act requires only the existence of sufficient prima facie evidence to move on to oral proceedings.

2.13 On 23 June, the author lodged an application for reconsideration before the Constitutional Court. In this application, she maintained that her statement, which was consistent and free of contradictions, together with the numerous medical reports certifying chronic post-traumatic stress disorder, provided sufficient evidence to justify oral proceedings in accordance with due process of law, which would have provided an opportunity to clarify the alleged events. On 12 January 2005, the Constitutional Court issued an order dismissing the application for *amparo* on the grounds that it demonstrably lacked content that would justify a decision on its merits.

2.14 On 11 July 2005, the author lodged an application with the European Court of Human Rights, alleging a breach of article 3, independently and in relation to article 1 of the European Convention on Human Rights, for a lack of effective investigation into her claim of torture. On 13 May 2008, the author received a letter from the Court informing her that a committee of three judges had decided to declare the application inadmissible, since they did not find “any appearance of violation of the rights and freedoms guaranteed by the Convention and its Protocols”.

2.15 The author claims that the Court based this decision on appearances alone and, in not granting the application, failed to recognize the merits of the case. There is consequently no reason for the present communication not to be reviewed by the Committee.

2.16 The author has provided the Committee with a copy of the medical reports mentioned above and stresses that all the psychiatrists who treated her belong to official bodies (detention centres, the Basque Health Service and medical forensic clinics). None of them were private.

The complaint

3.1 The author states that the events described constitute a violation of article 10, paragraph 1, of the Covenant, in that she was tortured while held in incommunicado detention on 7, 8 and 9 June 1996. She maintains that if she had not been put into incommunicado detention, the Civil Guard officers would not have acted with the degree of impunity that they did and the events described could have been avoided. Restricting a detainee’s right to be assisted by a trusted counsel, which entails the possibility of a private meeting, or at least communicating to the detainee’s family that there is such a possibility, creates a sense of depression in the detainee and impunity in the police officers concerned, and gives rise to situations with extremely serious consequences, as in the present case. In this connection, the author recalls the recommendations by the Committee and the special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment that Spain should abolish incommunicado detention.

3.2 The author states that the Spanish courts prevented a fair trial on the acts of torture. In the absence of a conviction, she has not had access to what is claimed to be the material responsibility of the State. Through the present communication, her objective remains the same. Most importantly, she seeks a declaration that she was tortured and, as a result, that she will receive indemnification. She therefore requests that the Committee should declare the incompatibility of incommunicado detention, which is governed by articles 520 bis and 527 of the Criminal Procedure Act, with article 10, paragraph 1, of the Covenant. She maintains that the regime of incommunicado detention constitutes an obstacle to efforts to eradicate torture in Spain.

State party’s observations on admissibility

4.1 On 7 July 2010, the State party submitted its observations on admissibility, maintaining that the communication should be declared inadmissible. It asserts that the

author lodged an appeal concerning the same events before the European Court of Human Rights in July 2005, claiming that her rights had been violated under article 3 of the European Convention on Human Rights, both independently and in relation to article 1, owing to the lack of an effective investigation into her complaint by the Spanish courts. The author states that, since the appeal was dismissed, the issue has not been considered by any international court. The State party does not share this view. Even disregarding her appeal and its dismissal, decisions on inadmissibility should, under article 35 of the Convention, be based on the Court's evaluation of the merits ("the appeal is incompatible, with the provisions of the Convention or the Protocols thereto, manifestly ill-founded or an abuse of the right of application"). The rejection of an appeal on the grounds that it is manifestly ill-founded concerns not the mere external formalities or the observance of procedural rites but the material substantiation of a claim. Rejection implies a review by the same court and such a review means that the same issue cannot be brought before the Committee. This is the case envisaged in rule 96 (e) of the Committee's rules of procedure.²

4.2 With regard to the author's request that the Committee should order the State party to redress the damage suffered and declare the regime of incommunicado detention incompatible with the Covenant, domestic remedies have not been exhausted. There are separate channels in place for claiming compensation for damage caused by the actions of the public authorities or by the courts, which are independent and compatible with acquittal on any criminal charges that may have been brought against officials of those bodies. With regard to public administration, this matter is governed by Act No. 30/1992, which extends criminal liability farther than simply the perpetration of offences by officials or employees. Any injury caused by the normal or abnormal functioning of public services confers the right to indemnification. The author's filing of a criminal case did not prevent her prosecuting the State for causing injury, so long as its existence could be proved and there was a causal link with the functioning of public services. Consequently, it concurs with the criterion for inadmissibility provided for under article 96 (f) of the Committee's rules of procedure.

4.3 With regard to the possible non-compliance with the Constitution of procedural norms relating to incommunicado detention, as breaching the prohibition of torture or degrading treatment, the author did not bring the matter before the courts. Consequently, her complaint should be declared inadmissible, in accordance with article 96 (f) of the rules of procedure.

State party's observations on the merits

5.1 On 28 April 2011, the State submitted its observations on the merits. It points out that, notwithstanding her release in June 1997 and her acquittal in January 1998, the author did not submit a complaint regarding her treatment until 18 October 2000. Subsequently, the order dated 26 August 2002 under which investigating judge No. 28 of Madrid set the case aside states that there is no prima facie evidence to support the assertion that the alleged events took place. Also, it states that none of the lawyers who assisted the author during the course of her detention observed any signs of physical ill-treatment and she herself did not report this, "when it seems logical, in the circumstances, that the victim would have made the ill-treatment known to her lawyer and the investigating judge before whom she appeared; when questioned on the way that she had been treated, she responded only that she had not been hit".

5.2 In the course of the proceedings, a number of inquiries were conducted, in particular medical forensic inquiries. With regard to these, the judge states that, while it is recognized

² See footnote 1 for the text of the reservation.

that the author suffers from post-traumatic stress disorder following her detention and time in prison, “there is no objective information confirming that she suffered ill-treatment during detention; it is therefore impossible to establish a causal link between ill-treatment and her illness ... The mere fact of detention, in any circumstance — in this case for allegedly belonging to the terrorist group *Euskadi Ta Askatasuna* (ETA) — followed by imprisonment, causes or can cause a person to become unbalanced and develop “a psychological personality disorder.” The order, in setting the case aside, does not affect any civil proceedings to obtain the appropriate indemnification for damage and harm that the author may have suffered.

5.3 In its ruling rejecting the appeal, the Madrid Provincial Court concluded that “there is no evidence to suggest a logical and chronological connection between the particular situation alleged to have taken place on or around 14 June 1996 and the medical assistance provided later at the detention centre where the complainant was admitted, because the prison medical services were not informed until 18 June 1996 of the anxiety suffered on the first date, 14 June 1996, although it came to light as a result of her detention”. With regard to the application for *amparo*, the Constitutional Court concluded that, in view of the many medical inquiries that had been undertaken, it was not convinced by the arguments put forward by the author regarding the relevance of the evidence that she requested, so it was not included in the Court’s final judicial decision.

5.4 Meanwhile, the application to the European Court of Human Rights was deemed inadmissible by the decision of a committee of three judges. This does not represent an unthinking or superficial decision but was made on the basis of a thorough examination of the facts. The letter informing the author of the decision states that the Court “does not observe any appearance of violation of the rights and freedoms guaranteed by the Convention or its Protocols”. Furthermore, although the case before the European Court ended on 13 May 2008, the author did not apply to the Committee until November 2009. This, added to the time that has passed since the decision of the Constitutional Court (almost five years) and the fact that the author waited almost three years to report the alleged ill-treatment to the domestic courts, calls into question the seriousness and substance of the present communication.

5.5 The author was arrested and placed in incommunicado detention for a period of just over 72 hours, after which she was detained in prison. From the perspective of article 7 of the Covenant, what is relevant is whether the medical condition observed during detention and pretrial detention over almost 15 months is a normal (although undesirable and unfortunate) consequence of this experience or whether it is the result of having been subjected to ill-treatment. The cause of the disorder was not determined clearly in the course of the legal investigation, despite the fact that numerous medical tests were conducted. Neither is new information included in the present communication that might lead to an alternative conclusion. While some of the medical reports lend credibility to the author’s version, others contradict it, or at least, indicate that other possibilities cannot be ruled out. Thus a report by Dr. E.F.R., a psychiatrist at the forensic medical clinic of the Ministry of Justice, produced at the request of investigating judge No. 28, notes that “a causal link between the allegation and the psychologically traumatic experience in question cannot be established, as the information provided by the informant is unsupported by objective data and we are unable to ascertain the truthfulness of this account. ... This post-traumatic stress may be due to multiple life stress factors and this expert cannot, in the light of the available diagnoses, categorically confirm which of them could trigger the alleged post-traumatic stress disorder. ... Detention alone could, in the circumstances and without the need for any ill-treatment, followed by imprisonment, lead to an adaptive disorder

exhibiting elements of post-traumatic stress disorder in which her detention, followed by imprisonment, could have acted as life stress factors.³

5.6 The claim of torture was submitted almost three years after the events allegedly took place, which objectively makes it difficult to effectively investigate. Nevertheless, the investigation identified all the Civil Guard officers who had had contact with the author. They were questioned; witness statements were taken from all the court-appointed lawyers who had had contact with the author during her detention, and from the forensic doctors who had examined her; and numerous medical reports on the author's state of health were included in the proceedings. These investigations served to prove the existence of a post-traumatic stress disorder. However, all the action taken, such as the taking of statements from independent lawyers who had assisted the author and from the forensic doctor, did not provide any circumstantial evidence that could justify the continuation of criminal proceedings with the opening of an oral trial. Although the theory that the author's disorders were a consequence of her detention and pretrial detention was acknowledged, there is reason to think that they are a consequence of the author's procedural situation and her arraignment on a serious criminal charge and not related to irregularities in her detention and pretrial detention.

5.7 With regard to the author's request for indemnification, the State party considers that this request extends beyond the Committee's mandate to consider individual communications. It reiterates that the author did not attempt to obtain any form of indemnification before the Spanish courts, in spite of the fact that the law provides for a specific procedure for cases of persons held in pretrial detention and later acquitted. There is an impartial system of material responsibility in place, which also includes compensation for moral damage and in which it is not necessary to prove that ill-treatment or torture has occurred.⁴ Therefore, the author's claim that it is not possible to obtain indemnification without the prior conviction of those responsible for torture is unfounded.

5.8 With regard to the author's complain relating to the incommunicado detention regime, the State party maintains that it is inappropriate to examine, on the basis of an individual communication, a complaint aimed at prompting an abstract, general consideration of whether a domestic legal rule is compatible with the Covenant. Moreover, incommunicado detention, which is regulated by articles 520 bis and 527 of the Criminal Procedure Act, in line with article 10, paragraph 1, of the Covenant. Such detention may be imposed only in specific cases and in a restrictive manner. Its application requires legal authorization in all instances on the basis of a substantiated and reasoned decision, which must be issued in the first 24 hours of detention. It also requires constant and direct monitoring of the detainee's personal situation by the judge who approved the detention, or the investigating judge of the judicial district where the detainee is being held. The only differences from the regular detention regime are: (a) a lawyer is appointed by the court; (b) detainees do not at any time have the right to let family members or anyone else know the reason for their detention or where they are being held in custody; (c) detainees do not have the right to a private interview with the court-appointed lawyer on the conclusion of the inquiry in which they have participated; and (d) the maximum period of detention (72 hours) may be extended by the judge. The question of duration is not significant in the case of the author, since she was arrested on 7 June and had been brought before a court by 11 June.

³ The author provided the Committee with a copy of this report.

⁴ Art. 294, para. 1 of the Judiciary Organization Act: "Persons who, having undergone pretrial detention, are acquitted on the grounds that no offence has been committed or, on the same grounds, are released by court order shall, if they have suffered harm, be entitled to compensation."

5.9 As regards the provision of legal assistance by a court-appointed lawyer rather than by a freely chosen lawyer, the aim is to strike a balance between the prevention of terrorist attacks and the protection of detainees. A court-appointed lawyer is nominated by a professional body independent of the public authorities and must hold special professional qualifications to assist persons held incommunicado, including 10 years of professional experience and proven competence in criminal law. The presence of a lawyer has the purpose of ensuring that detainees' constitutional rights are respected, that they do not suffer coercion or treatment incompatible with their dignity and freedom to testify and that they are given appropriate technical advice on their conduct during questioning, including the option of remaining silent. In any case, detainees' statements to the police lack evidentiary value in themselves. Once the incommunicado period has ended, detainees regain the right to choose their own lawyer.

5.10 The State party asserts that the legal rules applied to the author have since been amended and a general reform of the incommunicado regime is under consideration within the framework of the reform of the Criminal Procedure Act. Thus, a reform of November 2003 allows a person held incommunicado to request to be seen by a second forensic medical examiner appointed by the competent judge or court in order to establish the facts. Neither the judge nor the Government authorities can choose which forensic medical examiner will see a specific detainee; this is the responsibility of the doctor assigned to the court that ordered the detention.

5.11 Several of the six judges in charge of examining terrorist crimes currently allow additional guarantees in the form of recorded police interviews and additional medical supervision. These measures, which are placed on record in accordance with an order issued on 12 December 2006, have been applied to approximately 90 per cent of those detained incommunicado since then. The additional medical supervision entitles detainees to be examined by a doctor of their choice, if they so request, jointly with the forensic medical examiner, who visits the detainee every eight hours or whenever necessary. The medical examiner produces one report and the personal doctor another and both reports are submitted to the judge who will take the detainee's statement.

Author's comments on the State party's observations on the merits

6.1 On 28 July 2011, the author submitted comments on the State party's observations. With regard to the State party's argument that the author only filed a complaint three years after her release, she states that her counsel sent a letter to the court examining the case against her, in which he detailed her ill-treatment, and that, in the statement that she made before the same court on 7 January 1998, she had confirmed that the contents of that letter were correct. Furthermore, she points out that one of the medical reports that were submitted confirms that the very pathology unleashed by her experiences may be a sufficient reason to explain why she did not report the incident at the outset. Her mental state did not allow her to make the great effort required to lodge a complaint. She did not have the strength to do so until October 2000.

6.2 The author reiterates her disagreement with the statement made in the order dated 26 August 2000, closing the case, that it was impossible to establish a causal link between her possible ill-treatment and her illness. She recalls the reports submitted by independent psychiatrists, one of which, for example, states that "she exhibits a post-traumatic stress disorder incidental to having suffered inhuman and degrading treatment, which included physical and psychological violence, during police detention in 1996". The report also states that "she did not suffer from any psychiatric disorder or personality deviation prior to the police detention that could have had a bearing on the state she exhibited following her detention". The author categorically rejects the statement in the order that her psychological suffering is due simply to her detention.

6.3 With regard to the application to the European Court of Human Rights, the author states that she filed the application on 11 June 2005 and that the Court took more than three years to reach a decision. The fact that it took just over a year to bring her case before the Committee after she had been notified of the Court's decision was due to the scepticism she felt following the repeated negative decisions obtained up until that point.

6.4 The author points out that all the psychiatrists who have examined her have drawn the same conclusions. The report that the State refers to in order to claim that there was not such unanimity was produced by Dr. E.F.R., who never treated or examined her. With regard to the statements given by the police officers who are alleged to have been taken to court, they refused, in the one appearance before investigating judge No. 28, to answer the questions of the defence counsel, and the prosecution service did not even question them. The prosecution service did not participate in any of the inquiries carried out at the examination stage while the proceedings were going on. The prosecution service also failed to institute proceedings *ex officio* when, during the case brought against her by the National High Court, the author reported having suffered ill-treatment.

6.5 With regard to the claim for damages, the author says that, if it is recognized that she was tortured, the only way of minimally repairing the harm she has suffered is to pay compensation. Free, specialized medical assistance would also be of great help. She says that she is open to whatever compensation is considered to be appropriate.

6.6 Regarding the compensation procedure referred to by the State, set out in article 294 of the Judiciary Organization Act, the Act requires proof that the offence with which an individual was charged was not committed. However, it is generally impossible to prove a negative, which makes acquittal practically unfeasible.

6.7 As for her application relating to the *incommunicado* regime, the author claims that this is completely relevant. In spite of the Committee's recommendations, this regime, which is governed by articles 509, 520 bis and 527 of the Criminal Procedure Act, has been neither revoked nor amended. The changes referred to by the State party were made after the events of the present case.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee observes that the author presented an application on the same events before the European Court of Human Rights. In a letter dated 13 May 2008, the author was informed that a committee of three judges had decided to declare the action inadmissible, since it did not observe any apparent violation of the rights and freedoms guaranteed by the Convention or its Protocols. The Committee recalls that, in ratifying the Optional Protocol, Spain introduced a reservation excluding the competence of the Committee in relation to cases that have been or are being examined under another procedure of international investigation or settlement.

7.3 The Committee recalls its case law relating to article 5, paragraph 2 (a) of the Optional Protocol to the effect that, when the European Court bases a declaration of inadmissibility not solely on procedural grounds but also on reasons that include a certain consideration of the merits of the case, then the same matter should be deemed to have been "examined" within the meaning of the respective reservations to article 5, paragraph 2 (a), of the Optional Protocol; and it must be considered that the European Court has gone well beyond the examination of the purely formal criteria of admissibility when it declares a

case inadmissible because “it does not reveal any violation of the rights and freedoms established in the Convention or its Protocols”.⁵ However, in the particular circumstances of this case, the limited reasoning contained in the succinct terms of the Court’s letter does not allow the Committee to assume that the examination included sufficient consideration of the merits in accordance with the information provided to the Committee by both the author and the State party. Consequently, the Committee considers that there is no obstacle to its examining the present communication under article 5, paragraph 2 (a), of the Optional Protocol.

7.4 The Committee observes that the author initiated criminal proceedings for torture before a court of first instance, filed an appeal with the Provincial Court (*Audiencia Provincial de Madrid*) and an application for *amparo* before the Constitutional Court, all of which were unsuccessful. It therefore considers that domestic remedies have been exhausted. The other admissibility requirements having been met, the Committee declares the communication admissible and proceeds to its examination on the merits.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

8.2 The author states that she was tortured while being held incommunicado from 7 to 9 June 1996, during which period she did not have the right to be assisted by a lawyer of her choice or to communicate with her family. She maintains that, as a result of the treatment she received, she suffers from chronic post-traumatic stress disorder, which has been diagnosed by several doctors from the public health system, and she continues to require treatment for this. The author also maintains that she did not have access to a fair trial after reporting the events, as the judge closed the case without providing the opportunity for an oral trial, on the grounds that there was no objective information to establish that she had suffered ill-treatment. The State party maintains that the cause of the disorder from which the author suffers was not clearly established by the judicial investigation, in spite of the numerous forensic medical examinations that were carried out, and that the disorder may be a consequence of procedural situation experienced by the author as a result of the action brought against her. The State party also maintains that none of the tests carried out produced sufficient prima facie evidence to continue the criminal proceedings by means of an oral trial.

8.3 The Committee recalls its general comments No. 20 (1992)⁶ and 21 (1992)⁷ regarding the relationship between articles 7 and 10, paragraph 1, of the Covenant and considers that the facts alleged by the author, fall within the scope of application of article 7, read independently and in conjunction with article 2, paragraph 3, of the Covenant. The Committee will therefore examine the facts from that perspective and not under article 10, paragraph 1, which is invoked by the author.

⁵ Communication No. 944/2000, *Mahabir v. Austria*, decision on inadmissibility of 26 October 2004, paras. 8.3 and 8.4.

⁶ General comment No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment (art. 7 of the Covenant), *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A.

⁷ General comment No. 21 (1992) on the humane treatment of persons deprived of their liberty (art. 10 of the Covenant), *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. B.

8.4 The Committee takes note of the author's detailed and consistent description of the events surrounding her arrest and detention in the Civil Guard Headquarters in Madrid. It also takes note of the medical reports that the author has submitted, in particular the reports from psychiatrists who have treated her and diagnosed the existence of chronic post-traumatic stress disorder, the origin of which is alleged to lie in the events surrounding her detention. According to these reports, her disorder has necessitated periods of hospitalization and prolonged treatment up until the present time. In the face of this evidence, the State party puts its weight behind the report of the psychiatrist from the forensic medical clinic of the Ministry of Justice, produced at the request of investigating judge No. 28, in which he claimed that he could not categorically establish the origin of the disorder solely on the basis of the medical reports referred to above. However, in the Committee's opinion, this report, a copy of which was provided by the author in the framework of the present communication and which was issued without the author having been examined by the doctor concerned, does not constitute sufficient grounds for refuting the medical reports based on the examination and direct treatment of the author. Moreover, it cannot serve to support the conclusion that events did not occur in the way the author describes. The report also maintains that the absence of objective information makes it impossible to establish a causal link between the author's disorder and the events that she describes. This prompts the Committee to address the issue of the investigation of the author's complaint by domestic courts.

8.5 The Committee observes that, in the course of the investigation by investigating judge No. 28, the Civil Guard officers who had dealt with the author, the court-appointed lawyers provided by the State during her incommunicado detention and the forensic medical examiner who examined her at that time were identified and questioned. However, the author claims that the Civil Guard officers, in the sole appearance that they made before a judge, refused to answer questions from the private prosecutor. As for the court-appointed lawyers and the forensic medical examiners, who stated that the author had not complained of ill-treatment, the Committee considers that the reasons given by the author for not informing them of the treatment to which she had been subjected are convincing, especially bearing in mind the vulnerable position in which she found herself as a result of the incommunicado regime. The Committee also observes that, during the course of the author's trial in the National High Court, the author reported the ill-treatment she had suffered while held incommunicado, but no ex officio investigation was carried out.

8.6 The Committee recalls its general comments No. 20 (1992),⁸ and No. 31 (2004)⁹ as well as its settled jurisprudence,¹⁰ according to which complaints alleging a violation of article 7 must be investigated promptly, thoroughly and impartially by the competent authorities and appropriate action must be taken against those found guilty. In the present case, the Committee considers that the closure of the case at the examination stage, which prevented the holding of the oral trial does not meet the requirements or thoroughness that should be applied to all reports of acts of torture, and that the only inquiries conducted at the examination stage were not sufficient to examine the facts with the rigour required by the severity of the author's illness and the reports of the doctors who treated and diagnosed her. Given the difficulty of proving the existence of torture and ill-treatment when these do not leave physical marks, as in the case of the author, the investigation of such acts should

⁸ Para. 14.

⁹ General comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 4, (A/59/40 (Vol.I))*, annex III, para. 18.

¹⁰ See, for example, communication No. 1829/2008, *Benitez Gamarra v. Paraguay*, Views adopted on 22 Mar. 2012, para. 7.5.

be exhaustive. Furthermore, all physical or psychological damage inflicted on a person in detention — and particularly under the incommunicado regime — gives rise to an important presumption of fact, since the burden of proof must not rest on the presumed victim.¹¹ In those circumstances, the Committee considers that the investigation conducted by the domestic courts was not sufficient to guarantee the author her right to an effective remedy and that the facts before it constitute a violation of article 7, read independently and in conjunction with article 2, paragraph 3, of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 7 of the Covenant, read independently and in conjunction with article 2, paragraph 3, of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy which should include: (a) an impartial, effective and thorough investigation of the facts and the prosecution and punishment of those responsible; (b) full reparation, including appropriate compensation; (c) provision of free, specialized medical assistance. The State party is also under an obligation to prevent similar violations in the future. In that connection, it recalls the recommendation issued to the State party on the occasion of the Committee's consideration of the fifth periodic report that it should take the necessary measures, including legislative ones, to definitively put an end to the practice of incommunicado detention and to guarantee that all detainees have the right to freely choose a lawyer who can be consulted in complete confidentiality and who can be present at interrogations.¹²

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and ensure that they are widely disseminated.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

¹¹ European Court of Human Rights, application No. 40351/05, *Beristain Ukar v. Spain*, judgement of 8 March 2011, para. 39.

¹² Concluding observations of the Human Rights Committee on the fifth periodic report of Spain, (CCPR/C/ESP/CO/5), para. 14.

Appendix

Individual opinion of Committee members Ms. Anja Seibert-Fohr, Mr. Yuji Iwasawa, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Yuval Shany and Mr. Konstantine Vardzelashvili (dissenting)

We are unable to agree with the admissibility decision rendered by the Committee in this case for the following reasons. When the Spanish Government acceded to the Optional Protocol to the International Covenant on Civil and Political Rights, it did so “on the understanding that the provisions of article 5, paragraph 2, of that Protocol mean that the Human Rights Committee shall not consider any communication from an individual unless it has ascertained that the same matter has not been or is not being examined under another procedure of international investigation or settlement”.

According to the Committee’s established jurisprudence relating to article 5, paragraph 2 (a) of the Optional Protocol, this condition is not fulfilled if a case has been dismissed only on procedural grounds.^a However, when the European Court of Human Rights has based a declaration of inadmissibility not solely on procedural grounds but also on reasons that include “a certain consideration of the merits of the case”, then, according to the Committee’s jurisprudence, a matter should be deemed to have been “examined” within the meaning of the reservation to article 5, paragraph 2 (a) of the Optional Protocol.^b The Committee has recognized that “even limited consideration of the merits” of a case constitutes an examination within the meaning of the respective reservation.^c The matter is considered to be the same if the contents of the European Convention, as interpreted by the European Court of Human Rights, are sufficiently proximate to the protection afforded under the Covenant.

We see no reason to depart from this long-standing interpretation in the case before us. The European Court based its inadmissibility decision on the argument that it did not find “any appearance of violation of the rights and freedoms guaranteed by the Convention and its Protocols.” We fail to see how this could be interpreted other than as an even limited consideration of the merits. Indeed, the Committee has found in previous cases that the European Court should be considered as having gone beyond the examination of purely procedural admissibility criteria when declaring an application inadmissible on these grounds.^d

The author of the communication had the choice between submitting this case either to the European Court of Human Rights or to the Human Rights Committee. Once she had lodged an application with the European Court of Human Rights alleging a breach of article 3, independently and in relation to article 1 of the European Convention, which was subsequently declared inadmissible for the lack of an apparent violation of the rights and

^a Communication No. 716/1996, *Pauger v. Austria*, Views adopted on 30 April 1999, para. 6.4.

^b Communication No. 1396/2005, *Jesús Rivera Fernández v. Spain*, Decision on admissibility of 28 October 2005, para. 6.2.

^c Communication No. 944/2000, *Mahabir v. Austria*, Decision on admissibility of 26 October 2004, para. 8.3.

^d Communications No. 744/1997, *Linderholm v. Croatia*, Decision on admissibility of 27 July 1999, paras. 3 and 4.2; No. 944/2000 (footnote c above), para. 8.3; and No. 1396/2005 (footnote b above), para. 6.2.

freedoms guaranteed by the Convention, the matter has been “examined under another procedure of international investigation” pursuant to the reservation cited above. It is not for the Human Rights Committee to assess whether the examination of a case has been sufficiently careful under a procedure which enforces a norm affording an equivalent level of protection to that provided by article 7 of the Covenant, and which was invoked unsuccessfully by the author of a communication before the matter was brought to the Committee.

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee’s annual report to the General Assembly.]

Individual opinion of Committee members Mr. Cornelis Flinterman and Mr. Fabian Salvioli

1. We agree with the Committee's finding that the reservation introduced by Spain on its ratification of the Optional Protocol in the particular circumstances of the case cannot be regarded as an obstacle to the examination of the merits of the communication of the author under article 5, paragraph 2 (a), of the Optional Protocol. It would have been important, however, if the Committee would have highlighted the particular circumstances of the case in more detail. This would have made it clear that the Committee would only deviate from its general respect for reservations such as made by Spain and a substantial number of other European countries and Uganda in exceptional circumstances.

2. The Spanish reservation to article 5, paragraph 2 (a), implies that the Committee is barred from the examination of a communication from an individual unless it has ascertained that the same matter has not been or is not being examined under another procedure of international investigation or settlement, in this case the European Court of Human Rights. In the present case there is no dispute about the question of whether the communication before the Committee relates to the same matter as the complaint before the European Court of Human Rights. The main question is whether the European Court of Human Rights had indeed "examined" the case so as to give the reservation its preclusionary effect for purposes of article 5, paragraph 2 (a).

3. In this respect it is important to refer to the case law of the Committee from which it appears that the Committee does not consider the notion of "examination" of the matter in the context of reservations such as the Spanish reservation to signify "any examination" (*Lemercier v. France*, 1228/2003). That brings us to the particular circumstances of the present case. The Committee has noted the limited reasoning contained in succinct terms in the letter of the European Court of Human Rights to the author in which she was informed that the Court had declared her application inadmissible since the Court did not observe any apparent violation of the rights and freedoms guaranteed by the (European) Convention or its Protocols. Unfortunately, the Committee leaves it at that and does not further elaborate on the peculiar circumstances of the case.

4. The Committee could have added that in this particular case the letter had been sent by the European Court of Human Rights to the author almost three years after she had submitted her application to the Court without her application having been sent to the State party for its submissions on the admissibility or merits of the case. The Committee could further have noted that in this particular case the author had lodged her application to the European Court of Human Rights alleging a breach of article 3 of the European Convention on Human Rights and Fundamental Freedoms (prohibition of torture or inhuman or degrading treatment or punishment) which is similar to article 7 of the Covenant. The material presented to the European Court of Human Rights by the author was similar to the material presented to the Committee. In such cases where the physical integrity, yes indeed the right to life, of the individual complainant has been at stake, it should be clear from the record of the (inadmissibility) decision of the European Court of Human Rights that the Court has sufficiently given attention to the merits of the case in order to constitute an examination for purposes of the preclusionary effect of a reservation, like the Spanish one, to article 5, paragraph 2 (a), of the Optional Protocol. If that is not the case, the Committee may legitimately declare the communication admissible despite the reservation, like it did in the present case.

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